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IN THE

Supreme Court of the United States

October Term, 1959

ROBERT LAWRENCE COMPANY, INC.,

Petitioner.

—against—

DEVONSHIRE FABRICS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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ROBERT LAWRENCE COMPANY, INC.,

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—against—

DEVONSHIRE FABRICS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Medina, Lumbard and Burger, Circuit Judges), entered herein on October 28, 1959 which reversed an order of the District Court of the United States for the Southern District of New York denying defendant's motion to stay petitioner's action pending arbitration.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York (Dimock, *D.J.*) is unreported and is printed in the record on appeal to the Circuit Court (hereafter referred to as R.) R. 48a. The opinion in the Court of Appeals is reported at 271 F. 2d 402 and printed *infra*, p. A 17.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S Code §1254(1). The judgment of the Court of Appeals was entered on October 28, 1959.

Questions Presented

1. Whether the Federal Arbitration Act enacted substantive federal law and, in consequence, requires the validity, enforceability and irrevocability of an arbitration clause, incorporated in an interstate contract for the sale of goods, to be determined according to federal law, where such contract was in all other respects governed by state law, where federal jurisdiction existed solely by virtue of diversity of citizenship, and where, concededly, state law respecting the validity, enforceability and irrevocability of the arbitration clause was contrary to the rule of federal law enunciated and applied by the court below.

2. Whether the federal substantive rule of law (if any there be), applicable to arbitration clauses contained in such contracts, is that a valid, enforceable and irrevocable arbitration clause exists as a separable special agreement between the parties notwithstanding that it is contained in an interstate sales contract which had been induced by fraud unless it is shown that the fraud specifically relates to the inclusion of the arbitration clause in the fraudulently induced contract.

3. Whether as a matter of such federal substantive law (if any there be), an arbitration clause covering any question "which may arise with respect to [a] contract" requires arbitration of the question of whether the contract

containing such arbitration clause had been fraudulently induced.

Statutes Involved

The statutory provisions involved are §§2, 3 and 4 of the Federal Arbitration Act, 61 Stat. 669, 68 Stat. 1233, 9 U. S. C. §§2, 3 and 4. These provisions are reproduced in full, *infra*, p. A 13.

Statement of the Case

Petitioner, Robert Lawrence Company, Inc., a Massachusetts corporation, sued in the United States District Court for the Southern District of New York to recover damages for fraudulent representations made by the defendant-respondent, Devonshire Fabrics, Inc., a New York corporation, prior to signing of the purchase order as to the quality of fabrics sold to petitioner, shipped to it from New York to Boston, and paid for by petitioner.

Defendant had knowingly misrepresented, both orally and in writing, that goods, already in existence, were "first quality"; petitioner ordered the goods and, without such a representation, would not have done so. Defendant's own tests confirm the inferior quality of the goods.* Defendant contested the charge of fraud and rejected plaintiff's demands that it accept return of the goods. Plaintiff-petitioner's suit for damages followed.

Defendant moved under Section 3 of the Federal Arbitration Act to stay petitioner's action on the ground that the parties had, by virtue of an arbitration clause contained

* The Court below stated that, in the present posture of the case, it had to assume that the alleged fraud had taken place (271 F. 2d at 404 p. A 19).

in the order, agreed to arbitrate "any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto . . ." Upon a finding that there was a substantial issue as to whether or not the parties had agreed to arbitrate, the District Court denied the motion and held that the issue of the existence of an enforceable agreement to arbitrate must be resolved by the Court and could not be submitted to arbitration, because "if the contract was fraudulent in its inception and therefore voidable at the option of the plaintiff and plaintiff has disaffirmed such contract, then there is no valid agreement to arbitrate which would justify a stay" (R. 49a).

The Court of Appeals accepted the determination of the District Court that there was a substantial dispute as to defendant's fraudulent inducement of the contract of sale. It also recognized that under New York law the claim was not arbitrable; but it held (a) that the Federal Arbitration Act was an enactment of substantive law that displaced state contract law on the subject of whether or not an enforceable agreement to arbitrate existed, (b) that the federal law was, or should be, that the arbitration clause in a contract was by its nature severable and that it could not be said to be nullified by any fraud found to have nullified the whole transaction of which the arbitration clause was a part, but could be sustained if it was found that both parties had nevertheless at least "agreed" to arbitrate fraud, (c) that here both parties had as a matter of law "agreed" to arbitrate fraud in the inducement because each had proffered to the other an order form containing an arbitration clause, and (d) that petitioner would, therefore, have to—and could—arbitrate its claim of fraud under the arbitration clause. On these bases, the Court of Appeals reversed and directed the Dis-

trict Court to stay petitioner's action pending arbitration.

Reasons for Granting the Writ

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.*

The court below not only decided (a) that both the validity and the interpretation of arbitration clauses in interstate contracts were governed by a newly evolved concept of federal substantive law of arbitration, but, also, (b) recognized that this conclusion required that all state courts—though operating under their own arbitration laws and laws of contract—must henceforth adjudicate questions of the validity and interpretation of arbitration clauses in all interstate contracts in accordance with Federal law and Federal decisions. Said the court below (271 F. 2d at 407; pp. A 24-25):

> " . . . Congress based the Arbitration Act in part on its undisputed substantive powers over commerce and maritime matters . . . Section 2 declaring that arbitration agreements affecting commerce or maritime affairs are 'valid, irrevocable, and enforceable' . . . must mean that arbitration agreements of this character, previously held by state law to be invalid, irrevocable or unenforceable are now made 'valid, irrevocable and

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* The court below said (271 F. 2d at 404; p. A 19):

"The case involves questions left open by the Supreme Court in Bernhardt v. Polygraphic Co. of America, Inc., 1956, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, and these questions are interesting and important. The basic inquiry must be whether the validity and interpretation of the arbitration clause of the contract in this case is governed by Federal law, i.e., the Federal Arbitration Act, or by local law."

> enforceable.' This is a declaration of national law equally applicable in state or federal courts."

The importance of the decision is obvious.* The decision is important not only to the textile industry out of which the present case arises and in which arbitration clauses are all but universal,** but also because it both cuts across the whole field of arbitration law and propounds a novel principle that can drastically affect and create confusion as to the powers of federal and state courts.

The court below in deciding the "interesting and important" questions it considered that this Court had left open in *Bernhardt* v. *Polygraphic Co. of America, Inc.* 350 U. S. 198 (1956), reached a conclusion contrary to the central principle that this Court regarded as dispositive of that case (p. 203):

> "If the Federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where a suit is brought."

For the court below acknowledged (271 F. 2d at 412, p. A 34):

> "We note that were we compelled to apply New York law to the problems involved in this case we

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* The New York Times of the day following the decision, October 29, 1959, carried a front page story to the effect that the decision "was believed to represent a revolutionary concept in interpreting the intention of Congress in enacting the Federal Arbitration Act. The decision was reported in New York City radio news broadcasts on the evening of the decision and on the morning following.

** The American Arbitration Association records show that 65 commercial arbitrations were conducted by it alone in 1957; 52 private civil contract cases based on diversity of citizenship were instituted in the six United States District Courts for the Second Circuit in the fiscal year ending June 30, 1959.

would have been forced to arrive at a contrary conclusion."

On the one hand this Court in the *Bernhardt* case treated the question as a part of the law of remedies which law, because it could affect the outcome of the litigation, would have to be determined in accordance with the law of the state in which the litigation was pending, including the Conflict of Laws rules of that state. On the other hand the court below has squarely held that the Federal Arbitration Act is substantive in its application to interstate contracts and therefore preempts the interpretation of all arbitration clauses (but only such clauses) in contracts involving interstate commerce. The court below, indeed, explicitly disagreed with the view of Mr. Justice Frankfurter, expressed in his concurring opinion in the *Bernhardt* case, that the Federal Arbitration Act should be held wholly inapplicable in diversity cases.

The decision below thus has invented a novel and unworkable principle under which two laws would separately apply to different parts of the same contract. State law, though generally the source of contract rights, would be substantively displaced as to part of the contract. More than that, state courts would have to substitute for their own law as to such part, a fresh body of federal contract precedents to be gleaned from Courts in 86 Federal Districts in 50 states, Courts of Appeals in eleven circuits and, ultimately, from necessarily infrequent clarifying decisions in this Court.

Thus, the decision below importantly concerns the definition of state-created rights as against federally-created rights, the essential nature of the Federal Arbitration Act in its relation to commercial contracts involving interstate commerce as remedial or substantive law, and the scope

and application of the principles that this Court was thought to have settled in the *Bernhardt* case.

2. The Court of Appeals has rendered a decision directly in conflict with the decisions of the Court of Appeals for the Sixth Circuit in *American Airlines, Inc.* v. *Louisville and Jefferson County Air Board*, 269 F. 2d 811 (1959) and the Ninth Circuit in *Ross* v. *Twentieth Centry-Fox Film Corporation*, 236 F. 2d 623 (1956).

The Circuit Court of Appeals for the Sixth Circuit in the *American Airlines* case held, a month before the decision below was rendered, that in determining whether an arbitration clause contained in a lease of airport facilities was valid, the District Court had been right in applying local state law rather than federal law, notwithstanding that the transaction involved commerce among the states.*

The decision in the case at bar is in acknowledged conflict with the decision of the Ninth Circuit Court of Appeals in *Ross* v. *Twentieth Century-Fox Film Corporation*, 236 F. 2d 632 (1956). The court there held that "even if this [interstate] contract is of the sort contemplated by Section 3 of Title 9, the interpretation of the contract is still a matter of California law, and it must be determined by reference to that law whether the contract contains language which amounts to a provision for arbitration." The court in the case at bar put the *Ross* case aside as being founded on an erroneous reading of this Court's decision in the *Bernhardt* case (271 F. 2d at 409; p. A 27).

3. The decision of the court below has overturned a long-standing construction of Federal law and reached a

* Apparently the Second Circuit Court of Appeals did not have the advantage of considering the opinion in the *American Airlines* case as it is not cited.

conclusion at variance with earlier decisions in the Second and other circuits in its conception of a new principle of law applicable to the enforceability of arbitration clauses:

For the first time in 34 years the Federal Arbitration Act has been interpreted so as to compel arbitration of a contract obtained through fraud.

The Court in the case at bar has in effect overturned the earlier decision of the Second Circuit in *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (2d Cir. 1942), a case involving denial of the making of a charter party containing an arbitration clause. The earlier court held (a) that arbitrators could not—without impermissible self-stultification—pass upon the question whether the contract to which they owed their appointment had validly come into existence, and (b) that the Federal Arbitration Act clearly did not contemplate arbitration of a controversy over the existence of the contract embodying the arbitration agreement (126 F. 2d at 986).

The court below brushed this decision aside as dealing with a case in which one party altogether denied that any contract had been made (271 F. 2d at 411, p. A 33), but that "distinction" equally comprehends any case like the present one, of fraud in the inducement of an entire transaction.

The court below openly disagreed with and put to one side as unconsidered the decision of the Sixth Circuit Court of Appeals in *Kentucky River Mills* v. *Jackson*, 206 F. 2d 111 (1953) which treated the issue of fraud in inducing a contract as an issue that had to be judicially litigated and one which could not be made the subject of arbitration (271 F. 2d at 411, p. A 33).

The court in the case at bar is also in apparent disagreement with other cases, which have assumed that the

Federal Arbitration Act does not require arbitration where the contract containing the alleged agreement to arbitrate has itself been induced by a fraud. *Reynolds Jamaica Mines, Ltd.* v. *LaSociete Navale Caenaise*, 239 F. 2d 689 (4th Cir. 1956); *Almacenes Fernandez, S.A.* v. *Godoletz*, 148 F. 2d 625, 628 (2d Cir. 1945); *McElwee-Courbis Construction Co.* v. *Rife*, 133 F. Supp. 790, 794 (W. D. Pa. 1955).

It is plain therefore that the decision of the court below on the arbitrability of fraud in the inducement is contrary to the gist and trend of the decisions in other circuits, including earlier decisions in the court below and overturns a substantial body of cases.

4. The court below manifestly misinterpreted Section 2 of the Federal Arbitration Act in developing its novel doctrine that an arbitration clause contained in a contract is "separable" from the contract of which it is a part.

This novel doctrine is directly in conflict with *Kulukundis* which held 126 F. 2d 985-6 that an arbitration clause is an integral part of the contract.

In so disagreeing, the court found that it is not enough that there be substance to petitioner's "charge that the contract to deliver merchandise of a certain quality was induced by fraud" but that petitioner—beyond that—had to show that it had been induced—specifically—to sign the arbitration clause itself by a fraud directed to that clause.

The Circuit Court concluded, as a matter of law on the facts before it, that petitioner had not been induced by any particular fraud directed to arbitration matters to assent to the inclusion of that clause in the contract. The

court concluded—therefore—that petitioner could not be relieved of the obligation to arbitrate.

If it were correct, the decision would be of far-reaching importance. The court below was consciously rejecting the argument that if "the entire transaction was induced by fraud . . . the arbitration provision necessarily falls with the rest" (271 F. 2d at 411, p. A 32). But assent to a contract is not partible, nor is it distributable to clauses of a contract, when the reality is that no part of the contract would have been entered into at all had the fraud gone uncommitted. The court below sought to translate the structure of the Federal Arbitration Act into a far-reaching principle—that fraud warrants only the rescission of those parts of a contract to which the misrepresentations specifically relate and does not to any other extent negate the reality of the contract as a whole.

The novel principle proposed is as false in reason as it is in its realism. The fraud practised to induce a transaction permeates it. It takes less than an instant of reflection to realize that men do not consciously and separably agree to arbitrate the possibility that the entire transaction in which they are engaging has been the product of a fraud upon them. Realistically their assent to arbitration is confined by the assumption that the transaction is founded in candid commercial dealing and will operate within the limits of contractual obligations genuinely arrived at.

In the market place the arbitration clause of a contract is never considered separately by business men much less signed separately. In almost every textile case it is a "small print" clause on the reverse side of the order. To suppose that there could ever be a fraud as to such a clause alone separate and apart from the entire contract is to ignore the true realities of the business world.

It is imperative therefore that the important question of federal law arising from the novel approach of the Circuit Court in the case at bar and overturning long standing precedent be resolved by this court.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX

Statutes

"§2. *Validity, irrevocability, and enforcement of agreements to arbitrate.*

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

"§3. *Stay of proceedings where issue therein referable to arbitration.*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending; upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

"§4. *Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.*

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in

the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty eighth day of October one thousand nine hundred and fifty nine.

Present:

HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
HON. W. E. BURGER,

Circuit Judges.

ROBERT LAWRENCE COMPANY, INC.,

Plaintiff-Appellee,

—v.—

DEVONSHIRE FABRICS INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded with a direction to grant the stay in accordance with the opinion of this court, with costs to the appellant.

A. DANIEL FUSARO,
Clerk.

Filed: October 28, 1959.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 121—October Term, 1958

(Argued January 16, 1959 Decided October 28, 1959.)

Docket No. 25209

ROBERT LAWRENCE COMPANY, INC.,

Plaintiff-Appellee.

—against—

DEVONSHIRE FABRICS, INC.,

Defendant-Appellant.

Before:

MEDINA, LUMBARD and BURGER,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge*.

The defendant appeals from an order denying a stay pending arbitration as provided in the arbitration clause of a contract involving interstate commerce. Opinion below not reported. Reversed.

OSCAR B. SACHS, New York, N. Y., *for plaintiff appellee.*

MARTIN H. SCHNEIDER, New York, N. Y. (David I. Shivitz and Halperin, Natanson, Shivitz Scholer & Steingut, New York, N. Y., on the brief), *for defendant-appellant.*

MEDINA, *Circuit Judge*:

Devonshire Fabrics, Inc. (Devonshire) appeals from an order denying its motion for a stay of proceedings pending arbitration pursuant to the United States Arbitration Act 9 U. S. C. Section 3.

Plaintiff in this action, Robert Lawrence Company, Inc. (Lawrence) is seeking damages for allegedly fraudulent misrepresentations made by Devonshire inducing it to purchase and pay for a quantity of woolen fabric. The transaction out of which this case arose was initiated on August 4, 1955 when Lawrence, a Massachusetts corporation, ordered through its New York City office 36 pieces of a certain style of wool. Devonshire, a New York corporation upon receipt of the order issued a confirmation which differed in several respects from the terms of the order. While the parties disagree as to which document embodies the final contract, each of the two documents contains the following provision for arbitration:

> "Any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration. If the controversy concerns the condition or quality of merchandise it shall be referred to the Mutual Adjustment Bureau of the cloth and garment trades pursuant to the rules and regulations thereof

All other controversies shall be submitted to the American Arbitration Association."

Delivery of the goods, originally scheduled for October 1, 1955 was postponed at Lawrence's request until June 1956 when shipment to Boston was made. Lawrence paid the purchase price of $9,062.43 in July 1956. According to Lawrence, whose version of the fraud we must accept in the present posture of the case, certain latent defects were subsequently discovered and the merchandise proved not to be "first quality" as called for by the agreement. It is disputed whether Lawrence "rescinded" the contract or whether it waived its right to do so by later inconsistent acts.

The court below denied the stay of proceedings pending arbitration and held: "The question whether or not there is a valid agreement to arbitrate must be decided by the court prior to the issuance of a stay and cannot be submitted to arbitration 'as a controversy thereafter arising out of such contract' within section 2. * * * If the contract was fraudulent in its inception and therefore voidable at the option of the plaintiff and plaintiff has disaffirmed such contract, then there is no valid agreement to arbitrate which would justify a stay."

I

*Questions of the Validity and Interpretation of an Arbitration Agreement "In Any Maritime Transaction or a Contract * * * Involving Commerce" Are Governed by Federal Not by Local Law*

The case involves questions left open by the Supreme Court in *Bernhardt v. Polygraphic Co. of America, Inc.*, 1956, 350 U. S. 198, and these questions are interesting and important. The basic inquiry must be whether the validity and interpretation of the arbitration clause of the contract in this case is governed by Federal law, i.e. the

federal Arbitration Act, or by local law. But this critica issue is imbedded in a proliferation of collateral questions and all must be considered against the background of th concurring opinion of Mr. Justice Frankfurter in *Bern hardt* to the effect that, in order to avoid vexing consti tutional questions under *Erie R.R.* v. *Tompkins*, 1938, 30 U. S. 64, the Arbitration Act must be held wholly inap plicable in a diversity case. We are reluctant to disagre with so eminent a jurist whose views are so widely re spected but feel compelled to reach a different conclusion not only because the exclusion of diversity cases woul emasculate the federal Arbitration Act, but because we fin a reasonably clear legislative intent to create a new bod of substantive law relative to arbitration agreements af fecting commerce or maritime transactions. Thus we thin we are here dealing not with state-created rights but wit rights arising out of the exercise by the Congress of its con stitutional power to regulate commerce and hence there i involved no difficult question of constitutional law unde *Erie.*

The arbitration agreement before the Court in *Bern hardt* did not involve commerce nor did it affect a mari time transaction. But the defendant in that case move for a stay pending arbitration on the theory that the fed eral Arbitration Act was applicable because the limitation of Section 2 were said not to affect Section 3, and, even i the Act was not applicable, that arbitration was a mer mode of procedure and a federal court should follow it own practice rather than that of Vermont because in mat ters of procedure the law of the forum controls. Thi reasoning would have by-passed certain old Vermont case holding arbitration agreements to be revocable prior t the making of an award and unenforceable. But such result ran into *Erie* v. *Tompkins* head-on for the obviou reason that, had the case not been removed from the Ver

mont state court by reason of the diversity of citizenship of the parties, the determination of the merits of the controversy between the parties in the federal court might well have been just the opposite to the one that would have been reached had the case been permitted to remain in the state court. So the Court decided the case by holding: (1) that the federal Arbitration Act was inapplicable because the limitation to commerce and maritime matters in Section 2[1] applied as well to Section 3[2] and the rest of the Act; and, (2) that the enforceability of an arbitration agreement, apart from the Arbitration Act, "substantially affects the cause of action created by the State" and, because the dispute between the litigants was sufficiently substantive to bring into operation the *Erie* doctrine, the Court refused to apply the rule that the law of the forum governs matters of procedure. The Court flatly disagreed with the statement that arbitration "is merely a form of trial." Instead, the Court held that it was dealing with "a right to recover that owes its existence to one of the States,

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[1] Section 2 of the Act provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[2] Section 3 of the Act provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

not to the United States"; and the view of the federal District Judge in Vermont as to the Vermont law relative to the enforceability of arbitration agreements was adopted. This conclusion was reached notwithstanding the fact that in several other contexts the enforceability of an arbitration agreement had generally been considered to be procedural only.[3] But the constitutional difficulties Justice Frankfurter feared only become operative if the Arbitration Act is regarded as exclusively procedural in character and scope. And, if the Congress had relied solely on its power to regulate procedure in the federal courts

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[3] For choice of law purposes it has been generally held that the forum is free to apply its own "remedy", and is not compelled to enforce an arbitration agreement by applying the law of the State with the controlling contacts. See *Meacham* v. *Jamestown Franklin & Clearfield Ry.*, 1914; 211 N. Y. 346, 105 N. E. 653; *Gantt* v. *Felipe Y Carlos Hurtado & Cia, Ltda*, 1948, 297 N. Y. 433, 79 N. E. 2d 815; *Vitaphone Corp.* v. *Electrical Research Products*, 1933, 19 Del. Ch. 247, 166 Atl. 255. For the purpose of determining whether a state act enforcing arbitration is constitutional or an intrusion upon federal admiralty jurisdiction, the Supreme Court held arbitration to be "remedial." *Red Cross Line* v. *Atlantic Fruit Co.*, 1924, 264 U. S. 109. A similar characterization was also made to determine if the New York Act could constitutionally apply retroactively. *Matter of Berkovitz* v. *Arbib & Houlberg*, 1921, 230 N. Y. 261, 130 N. E. 288. In pre-Erie diversity cases the enforcement of an arbitration agreement was deemed "procedural" and state statutes upholding the agreements were accordingly held inapplicable. *California Prune & Apricot Growers' Ass'n* v. *Catz American Co.*, 9 Cir., 1932, 60 F. 2d 788; *Lappe* v. *Wilcox*, N. D. N. Y., 1926, 14 F. 2d 861. And the federal judicial power in admiralty was deemed not to have been unduly extended by the new enforcement provisions of the Act but was a valid exercise of congressional power "to provide remedies in matters falling within the admiralty jurisdiction of the federal courts, and to regulate their procedure." *Marine Transit Corp.* v. *Dreyfus*, 1932, 284 U. S. 263. Indeed, even in the *Erie* context prior to *Bernhardt* the dominant view was that the enforceability of arbitration agreements was procedural. Compare *Murray Oil Products Co.* v. *Mitsui & Co.*, 2 Cir., 1944, 146 F. 2d 381; *Parry* v. *Bache*, 5 Cir., 1942, 125 F. 2d 493; *Pioneer Trust & Savings Bank* v. *Screw Mach. Products Co.*, E. D. Wis., 1947, 73 F. Supp. 578 with *Tejas Development Co.* v. *McGough Bros.*, 5 Cir., 1947, 165 F. 2d 276.

to make arbitration agreements valid and enforceable, it might well be doubted whether the constitutional base provided adequate support for the legislative structure. But see Sturges and Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law & Contemp. Probs. 580, 587 (1952).

We think it is reasonably clear that the Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements. In the first place Section 2 of the Arbitration Act specifically limits its applicability to "any maritime transaction or a contract evidencing a transaction involving commerce." This indicates a congressional intention to rely on the admiralty power implied from Article III, Clause 2 and the commerce power, Article I, Section 8, Clause 3. Such intention is confirmed by the legislative history. See H. R. Rep. 96, 68th Cong., 1st Sess., p. 1 (1924). Moreover, the *Bernhardt* ruling is specifically to the effect that the maritime or commerce requirements had to be met before any other section of the Act could be applied. It is true that an additional reason for construing the Act "narrowly" was that such a construction avoided a constitutional difficulty arising out of the *Erie* doctrine; but we think this does not lessen the force of the principal basis for the ruling which is that the Congress intended the maritime or commerce requirements to permeate the Act in its entirety.

It is also clear that the Congress intended to exercise as much of its constitutional power as it could in order to make the new Arbitration Act as widely effective as possible. One of the dark chapters in legal history concerns the validity, interpretation and enforceability of arbitration agreements. From the standpoint of business men generally and of those immediately affected by such agreements they were beneficial and salutary in every way. But

to the courts and to the judges they were anathema. In England and in America the courts resorted to a great variety of devices and formulas to destroy this encroachment on their monopoly of the administration of justice, protecting what they called their "jurisdiction." An attempt to enumerate the ways in which arbitration agreements were declared to be against public policy and void, or revocable or unenforceable would now serve no useful purpose. See *Kulukundis Shipping Co., S/A* v. *Amtorg Trading Corp.*, 2 Cir., 1942, 126 F. 2d 978, 982. Suffice it to say for a considerable time prior to the passage of the Arbitration Act in 1925[4] the Congress had come to the conclusion that an effort should be made to legislate on the subject of arbitration in such fashion as to remove the hostility of the judiciary and make the benefits of arbitration generally available to the business world. See Sen. Rep. 536 *supra*. At that time and even today, in various states judge-made law still stands as an obstacle to the enforceability of arbitration agreements, as was illustrated in *Bernhardt*. It was not assumed that this hostility could be easily overcome, despite certain encouragement in the ranks of those in opposition. See *Red Cross Line* v. *Atlantic Fruit Co.*, 1924, 264 U. S. 109; *Atlantic Fruit Co.* v. *Red Cross Line*, S. D. N. Y., 1921, 276 Fed. 319, affirmed, 2 Cir., 1924, 5 F. 2d 218; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, S. D. N. Y., 1915, 222 Fed. 1006. Hence the Congress took pains to utilize as much of its power as it could and by doing so it sought to reduce to a minimum the danger of judicial rejection on constitutional grounds.

Thus we think the text of the Act and the legislative history demonstrate that the Congress based the Arbitra-

[4] The federal Arbitration Act, Title 9 of the United States Code, was first enacted in 1925, 43 Stat. 883. It was repealed and substantially reenacted in codified form in 1947, 61 Stat. 669.

tion Act in part on its undisputed substantive powers over commerce and maritime matters. To be sure much of the Act is purely procedural in character and is intended to be applicable only in the federal courts. But Section 2 declaring that arbitration agreements affecting commerce or maritime affairs are "valid, irrevocable, and enforceable" goes beyond this point and must mean that arbitration agreements of this character, previously held by state-law to be invalid, revocable or unenforceable are now made "valid, irrevocable, and enforceable." This is a declaration of national law equally applicable in state or federal courts. See Kochery, The Enforcement of Arbitration Agreements in the Federal Courts: *Erie* v. *Tompkins*, 39 Corn. L. Q. 74, 78 (1953). This conclusion flows directly from the realization by the Congress that nothing of significance would have been accomplished without tapping these substantive sources of power. It is these that put teeth into the statute and make it accomplish the salutary and beneficial ends the Congress had in mind. It matters not that in the interval of years since the passage of the Act this point has only rarely been noticed. See *Standard Magnesium Corp.* v. *Fuchs*, 10 Cir., 1957, 251 F. 2d 455; *Kentucky River Mills* v. *Jackson*, 6 Cir., 1953, 206 F. 2d 111, 117-18, cert. denied, 346 U. S. 887. What does matter is whether or not this reasoning is sound. And we believe it to be sound if the Congress intended to use to the fullest possible extent its powers to regulate commerce as it was affected by arbitration agreements and to do the same thing in the field of maritime law.

Nor do we think there is any tenable distinction between the holding in *Bernhardt* that the enforceability of an arbitration agreement is sufficiently substantive to call into play the *Erie* doctrine and our holding in this case that the questions of the validity and interpretation of the arbitration agreement before us are substantive questions. In

any event, it seems safe to say that those who drafted the Arbitration Act and supervised its progress through the House and Senate Committees had not the least suspicion that there might at some future day be raised the constitutional question referred to in Mr. Justice Frankfurter's concurring opinion in *Bernhardt*, the avoidance of which led him to the view that the Arbitration Act was wholly inapplicable to cases where the jurisdiction of the federal court was based on diversity of citizenship. *Erie* still was hidden in the mist of the future.

Mere catchwords, labels and cliches no longer smooth the path of justice as they so often did in the past. As noted above, arbitration has often been described as pertaining to the law of remedies, but this tendency is losing much of its fascination in these modern times. See *Ross* v. *Twentieth Century-Fox Film Corp.*, 9 Cir., 1956, 236 F. 2d 632; *Jackson* v. *Atlantic City Electric Co.*, D. N. J., 1956, 144 F. Supp. 551; *Miller* v. *American Insurance Co.*, W. D. Ark., 1954, 124 F. Supp. 160; Kochery, The Enforcement of Arbitration Agreements in the Federal Courts: *Erie* v. *Tompkins*, *supra*; Note, 56 Colum. L. Rev. 902 (1956); 41 Va. L. Rev. 379 (1955); Comment 27 Tex. L. Rev. 218 (1948). The opinion of Mr. Justice Douglas in *Bernhardt* summarizes nicely the manifold effects of such agreements.[5] We need not belabor them here. The crucial point is that the "nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action." See 350 U. S. at 203. Whether the bargain evidenced by the contract or agreement is or is not valid cannot differ essentially from the question of whether any other meeting of the minds of the parties will be recognized as having created certain rights. And the same may be said of the rules or principles to be evolved in connec-

[5] 350 U. S. at 203-04.

tion with the construction and interpretation of the agreement.

It is interesting to note that though new substantive federal rights were created, suits involving the application of the Arbitration Act do not furnish an independent basis of federal jurisdiction under 28 U. S. C. Section 1331. *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.*, 2 Cir., 1933, 62 F. 2d 1004; *In re Woerner*, 2 Cir., 1929, 31 F. 2d 283; *Mengel Co.* v. *Nashville Paper Products and Specialty Workers Union*, 6 Cir., 1955, 221 F. 2d 644. But see *Local 19, Warehouse Union* v. *Buckeye Cotton Oil Co.*, 6 Cir., 1956, 236 F. 2d 776, 781, cert. denied, 1957, 354 U. S. 910. This is evident upon consideration of the Act as a whole as the Congress under its Article III powers sought to prevent the federal courts from becoming unduly snarled by this far-reaching law. Section 4 relating to the filing of a petition to compel arbitration provides for such filing only in "any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties." And proceedings on motion for a stay pursuant to Section 3 are authorized only in "the court in which • • • suit is pending," which must mean a suit in which the court already has jurisdiction over subject matter. Section 8[6] also seems to presuppose a basis of jurisdiction other than the Arbitration Act. The explicitness with which the Congress

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[6] Section 8 of the Act provides:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

indicated that the assertion or denial of a right arising under the Act is not sufficient to give the federal court jurisdiction over subject matter, constitutes further proof that something more than mere "procedural" rules were intended. For if the Act were entirely "procedural" in character, it plainly could not furnish a basis of federal jurisdiction.

While the jurisdiction under either Section 3 or Section 4 may doubtless in some instances be federal question jurisdiction, based upon rights alleged to arise out of some federal statute other than the Arbitration Act, it would seem that the most numerous class of cases in which it was anticipated that resort would be made to the federal courts for the enforcement of arbitration agreements was diversity cases.

We, therefore, hold that the Arbitration Act in making agreements to arbitrate "valid, irrevocable and enforceable" created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases, just as the federal courts adjudicate controversies affecting other substantive rights when subject matter jurisdiction over the litigation exists.[7] We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are inextricably intertwined.

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[7] We think the court in *Ross* v. *Twentieth Century-Fox Film Corporation*, 9 Cir., 1956, 236 F. 2d 632, misconstrued *Bernhardt* when it held that the contract in that case, which involved commerce, was required by the *Bernhardt* reasoning to be interpreted according to California law.

In the case before us there can be little doubt that the transaction in question relates to an interstate shipment of goods and involves "commerce" within the meaning of Sections 1 and 2.* *Kentucky River Mills* v. *Jackson*, 6 Cir., 1953, 206 F. 2d 411, cert. denied, 346 U. S. 887; *Petition of Prouvost Lefebvre*, S. D. N. Y., 1952, 105 F. Supp. 757; *Wilson & Co.* v. *Fremont Cake & Meal Co.*, D. Neb., 1948, 77 F. Supp. 364, affirmed, 8 Cir., 1950, 183 F. 2d 57. We, therefore, find federal law as derived from the Arbitration Act to be controlling.

II

Formulation and Application of Substantive Rules Governing Arbitration Agreements Involving Commerce

We now turn to the decision of this case and the formulation of the principles of federal substantive law necessary for this purpose.

The District Court held that there could be no finding of an "agreement to arbitrate" until it was judicially resolved whether or not there was fraud in the inception of the contract as alleged by Lawrence. But surely this is oversimplification of the problem. For example, it would seem to be necessary to answer the following questions before we can decide to affirm or reverse the order appealed from: (1) is there anything in the Arbitration Act or elsewhere to prevent the parties from making a binding agreement to arbitrate any disputes thereafter arising between them, including a dispute that there had been fraud in the inception of the contract; (2) is the exception of Section 2, "save upon such grounds as exist at law or in equity for the revo-

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* Section 1 of the Act provides in part:

"'commerce,' as herein defined, means commerce among the several States or with foreign nations, * * *"

cation of any contract" applicable if such an agreement t
arbitrate has been made and the only fraud charged is frau
in inducing the purchase of the goods, rather than frau
in connection with the making of the agreement to arb
trate; (3) did the parties in the case before us make
binding agreement to arbitrate; and (4) is the arbitratio
clause broad enough to cover the charge of fraud.

That the Arbitration Act envisages a distinction betwee
the entire contract between the parties on the one hand an
the arbitration clause of the contract on the other is plai
on the face of the statute. Section 2 does not purport t
affect the contract as a whole. On the contrary, it make
"valid, irrevocable, and enforceable" only a "written provi
sion in any maritime transaction or a contract evidencin
a transaction involving commerce to settle by arbitration
controversy thereafter arising out of such contract or trans
action"; and Section 3 provides for the granting of a sta
in any suit or proceeding in the federal courts "upon a
issue referable to arbitration under an agreement in writ
ing for such arbitration."

Our construction of Section 2 treating the agreement t
arbitrate as a separable part of the contract is based no
only upon the clear wording of the text but is buttressed b
several other pertinent considerations. Historically arbitra
tion clauses were treated as separable parts of the contract
although such treatment generally meant the agreemen
was being deprived of its efficacy. *Hamilton* v. *Home In
surance Co.*, 1890, 137 U. S. 370; *Gatliff Coal Co.* v. *Cox*,
Cir., 1944, 142 F. 2d 876; *United States Asphalt Refinin
Co.* v. *Trinidad Lake Petroleum Co.*, S. D. N. Y., 1915, 22
Fed. 1006. And since the passage of the Arbitration Act
the courts have similarly held that the illegality of part o
the contract does not operate to nullify an agreement t
arbitrate. *Wilko* v. *Swan*, 2 Cir., 1953, 201 F. 2d 439, re
versed on other grounds, 346 U. S. 427; *Watkins* v. *Hudso*

Coal Co., 3 Cir., 1945, 151 F. 2d 311, cert. denied, 327 U. S. 777; *Petition of Prouvost Lefebvre*, S. D. N. Y., 1952, 105 F. Supp. 757. Nor does the alleged breach or repudiation of the contract preclude the right to arbitrate. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir., 1943, 126 F. 2d 978; *Almacenes Fernandez, S.A.* v. *Golodetz, supra*, 2 Cir., 148 F. 2d 625; *In re Pahlberg Petition*, 2 Cir., 1942, 131 F. 2d 968.

Finally, any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars. Such policy has been consistently reiterated by the federal courts and we think it deserves to be heartily endorsed. See *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp., supra*, 293 U. S. 449, 453; *Kulukundis Shipping Co.* v. *Amtorg Trading Corp., supra*, 2 Cir., 126 F. 2d 978; *Signal-Stat Corp.* v. *Local 475*, 2 Cir., 1956, 235 F. 2d 298, cert. denied, 1957, 354 U. S. 911. See also *Wabash Ry.* v. *American Refrigerator Transit Co.*, 8 Cir., 1925, 7 F. 2d 335, 351, cert. denied, 1926, 270 U. S. 643.

It would seem to be beyond dispute that the parties are entitled to agree, should they desire to do so, that one of the questions for the arbitrators to decide in case the controversy thereafter arises, is whether or not one of the parties was induced by fraud to make the principal contract for the delivery of the merchandise. Surely there is no public policy that would stand as a bar to an agreement of such obvious utility, as is demonstrated by the facts of this case. The issue of fraud seems inextricably enmeshed in the other factual issues of the case. Indeed, the difference between fraud in the inducement and mere failure of performance by delivery of defective merchandise depends upon little more than legal verbiage and the formulation of

legal conclusions. Once it is settled that arbitration agre
ments are "valid, irrevocable, and enforceable" we kno
of no principle of law that stands as an obstacle to a dete
mination by the parties to the effect that arbitration shou
not be denied or postponed upon the mere cry of frau
in the inducement, as this would permit the frustration
the very purposes sought to be achieved by the agreeme
to arbitrate, i.e. a speedy and relatively inexpensive tri
before commercial specialists.

The saving clause of Section 2 fits perfectly into th
framework disclosed by the above analysis. The agreeme
described in Section 2 is the arbitration "provision"
clause of the principal contract. If this arbitration claus
was induced by fraud, there can be no arbitration; and
the party charging this fraud shows there is substance to h
charge, there must be a judicial trial of that question befo
a stay can issue in a case of the type with which we are no
dealing. It is not enough that there is substance to th
charge that the contract to deliver merchandise of a certai
quality was induced by fraud.

Did the parties in the case before us make a binding agre
ment to arbitrate? While this narrow issue was obscure
in the court below by the miscellaneous and varied conte
tions of the parties, we think it clear that there exist n
grounds "at law or in equity" for the revocation of the arb
tration clause of the contract between Lawrence and Devo
shire. Indeed, there is no dispute on the point. Lawrenc
does not allege that the arbitration provision was induce
by fraud. Nor could it do so with any show of reason as it
own order contained this identical clause. What Lawrenc
does claim is that the entire transaction was induced b
fraud and that the arbitration provision necessarily fal
with the rest. This contention we reject as above state
because the facts of this case do not support the argumen

Accordingly, there is no reason why we should not now decide this preliminary issue and we hereby find that the parties did agree upon the arbitration clause quoted in the early part of this opinion and that such agreement is valid and binding.

It may well be that such charges of fraud may in some cases postpone arbitration because there is so little to support the finding that the parties agreed to arbitrate as to make necessary a preliminary trial of the issue of alleged fraud, to be followed by another trial before the arbitrators, if there is found by the court to have been no fraud. As has been shown, this case is different. And we would suppose that generally where the arbitration provision of the contract is sufficiently broad to encompass the issue of fraud, the mutual promises to arbitrate would form the *quid pro quo* of one another and constitute a separable and enforceable part of the agreement. We do not decide this point, however, as it is not necessarily before us.'

Certainly this is not a case like *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, *supra*, 2 Cir., 126 F. 2d 978, where the defendant denied ever agreeing to anything. Naturally such a question had first to be settled before arbitration could be directed. But it is remarkably similar to *Almacenes Fernandez, S.A.* v. *Golodetz*, 2 Cir., 1945, 148 F. 2d 625, where "fraud in the performance" was held to be an arbitrable question. See also *Reynolds Jamaica Mines, Ltd.* v. *La Societe Navale Caennaise*, 4 Cir., 1956, 239 F. 2d 689; *McElwee-Courbis Construction Co.* v. *Rife*, M. D. Pa., 1955, 133 F. Supp. 790. The issue of fraud in the procurement of the contract was evidently litigated by consent in *Kentucky River Mills* v. *Jackson*, *supra*, 6 Cir., 206 F. 2d 111, 120, cert. denied, 346 U. S. 887, but the broad dictum at page 120 would seem to indicate that the charge of fraud must in every case be judicially tried and disposed of. If

this be a fair interpretation of the language of the opin
we think it too broad and we disagree with it.

In the view we take of the case before us it is immate
that Lawrence claims to have rescinded the contract
that Devonshire disputed this claim and asserts that L
rence by later inconsistent acts waived any right to resci
We say there was a valid agreement to arbitrate, that
that remains is to construe the agreement and that
controversy over fraud in the inducement, whether L
rence affirmed or disaffirmed the contract and attempted
or did rescind it, is a "complaint, controversy or questi
which arose "with respect to this contract."

What is the proper construction and interpretation of
arbitration clause? Did the parties intend the arbitrat
proceedings to encompass a charge of fraud in the indu
ment to make the principal contract for delivery of
merchandise? We think it is clear that the parties
just that. It would be hard to imagine an arbitration cla
having greater scope than the one before us. Certai
fraud in the inducement is a "complaint, controversy
question which may arise with respect to this contract t
cannot be settled by the parties thereto." And we fail
perceive any rational basis for thinking that the issue
of such a character that only the courts can resolve it.
think that the charge of fraud in the inducement co
squarely within the phraseology of this particular agr
ment and that nothing short of a renascence of the
judicial hostility to arbitration could evolve a contr
ruling.

We note that were we compelled to apply New York
to the problems involved in this case, we would have b
forced to arrive at a contrary conclusion. Had this not b
so, we would not have given such detailed consideration
the choice of the applicable law. But the pattern and s

stance of New York law appear to be different than what we have found the federal law to be.

This seems to have been made clear in the 1957 decision of the New York Court of Appeals in *Matter of Wrap-Vertiser Corp. (Plotnick)*, 3 N. Y. 2d 17, 143 N. E. 2d 366. Plotnick claimed that he had been induced to pay $6,000 when the agreement was executed "for the purchase of supplies for distribution, on the strength of misrepresentation respecting the past business of the manufacturer, respecting a patent which the manufacturer claimed to have had but did not have, and with regard to the nature of the product." The arbitration clause which provided for the arbitration of any question "as to the validity, interpretation or performance of this agreement," was held not to encompass the question of fraud in the inducement. There was a strong dissent by Judge Burke, in which Judge Fuld and Judge Froessel concurred. There was no discussion of the separability of the arbitration agreement. Perhaps the Court of Appeals would have arrived at a different result had it been construing the somewhat broader language of the arbitration clause now before us. But with all due respect to a distinguished and able court, we think the approach to the problem by the New York Court of Appeals is too narrow. This restrictive New York policy is also reflected in the opinions in several other cases. *Manufacturers Chemical Co.* v. *Caswell*, 1 Dep't, 1940, 259 App. Div. 321, 19 N. Y. S. 2d 171, appeal dismissed, 283 N. Y. 679, 28 N. E. 2d 404; *Cheney Bros.* v. *Joroco Dresses, Inc.*, 1 Dep't, 1926, 218 App. Div. 652, 219 N. Y. Supp. 96, reversed on other grounds, 245 N. Y. 377, 157 N. E. 272; *Reo Garment, Inc.* v. *Jason Corp.*, Sup. Ct. Spec. T., 1958, 9 Misc. 2d 521, 170 N. Y. S. 2d 412; *Greenspan* v. *Greenspan*, Sup. Ct., Spec. T., 1954, 129 N. Y. S. 2d 258.

III

There Was No Waiver

One more point in this fascinating case remains to be disposed of. Lawrence asserts that Devonshire has waived its right to arbitrate or was "in default in proceeding with such arbitration" under Section 3 of the Act. The complaint was filed May 9, 1957 and in its answer filed June 13, 1957 Devonshire demanded arbitration. The motion for the stay of proceedings was made almost nine months later, March 4, 1958. During this time settlement was discussed and Devonshire consented to an examination before trial of its President. Such examination was adjourned repeatedly and has not yet been taken. Lawrence also maintains it released certain information to Devonshire otherwise unavailable and that Devonshire tested the disputed goods. The delay in moving for a stay and these various intervening acts are asserted to constitute the waiver or default. Such a contention, however, is without merit under the decided cases. Devonshire has at no time acted in a manner inconsistent with its right to arbitrate. Lawrence was apprised of Devonshire's intention to arbitrate from the time the answer was filed and the intervening steps taken with a view toward settlement can in no way affect Devonshire's rights. Indeed, considerably more significant intervening steps have not been regarded as amounting to a waiver. See *Farr & Co.* v. *Cia Intercontinental De Navegacion De Cuba, S.A.*, 2 Cir., 1957, 243 F. 2d 342; *Almacenes Fernandez, S.A.* v. *Golodetz, supra; Kulukundis Shipping Co.* v. *Amtorg Trading Corp., supra; Reynolds Jamaica Mines Ltd.* v. *La Societe Nuvale Caennaise, supra.* In the instances where a waiver has been found the party seeking the arbitration generally first brought up the subject only after long delay or when the trial was near at hand. *American Locomotive Co.* v. *Chemical Research Corp.*, 6

Cir., 1948, 171 F. 2d 115, cert. denied, 1949, 336 U. S. 909; *Radiator Specialty Co.* v. *Cannon Mills, Inc.*, 4 Cir., 1938, 97 F. 2d 318; *La Nacional Platanera, S.C.L.* v. *North American F. & S.S. Corp.*, 5 Cir., 1936, 84 F. 2d 881. The claim that Devonshire's rejection of an offer by Lawrence to arbitrate also constituted a waiver is likewise lacking in substance in view of the conditional nature of the offer.

Reversed with a direction to grant the stay.